

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MITCHEL CALVERT,  
  
Petitioner,  
  
v.  
  
ALICE PAYNE,  
  
Respondent.

CV-05-3028-FVS

ORDER DISMISSING REQUEST  
FOR HABEAS CORPUS RELIEF

**THIS MATTER** is before the Court pursuant to the Petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody, Ct. Rec. 6. Mr. Calvert is acting *pro se* in this matter. Ms. Payne is represented by Attorney General Rob McKenna and Assistant Attorney General John Joseph Samson. The Court has reviewed the entire file, including the pleadings submitted by both parties, and is now prepared to rule.

**BACKGROUND**

Mr. Calvert is a state prisoner who pleaded guilty to three counts of child rape on March 18, 2002. After exhausting his state remedies, he filed, *pro se*, a federal habeas corpus petition on March 11, 2005. The respondent contends his federal habeas corpus petition is barred by the statute of limitations.

On May 28, 2002, the trial court sentenced Mr. Calvert to 120 months in prison. The trial court did not orally inform Mr. Calvert

1 that he had a right to appeal his exceptional sentence. Mr. Calvert  
2 did, however, sign a plea statement that said defendants have a right  
3 to appeal an exceptional sentence. (Ex. 2, p. 3) A defendant must  
4 file notice of appeal within 30 days after the entry of the judgment,  
5 otherwise the right to appeal is irrevocably waived. CrR 7.2(b) Mr.  
6 Calvert did not file a notice of appeal.

7 Mr. Calvert's right to appeal expired on June 27, 2002, 30 days  
8 after his sentence. On Jan. 15, 2003, about nine months after his  
9 direct appeal period expired, Mr. Calvert sought collateral review  
10 *pro se* in the state court system. He timely moved to modify his  
11 sentence in Yakima County Superior Court. The Superior Court  
12 transferred the motion to the Washington Court of Appeals, Division  
13 Three. The Court of Appeals turned Mr. Calvert's motion into a  
14 personal restraint petition. CrR 7.8. The Court of Appeals denied  
15 the personal restraint petition. Mr. Calvert asked the Washington  
16 Supreme Court for discretionary review of the Court of Appeals'  
17 denial. The Washington Supreme Court denied discretionary review on  
18 Dec. 4, 2003.

19 While Mr. Calvert pursued collateral review, a Washington  
20 Supreme Court commissioner suggested that Mr. Calvert file a motion  
21 in the Court of Appeals for an untimely direct appeal, given that the  
22 trial court apparently did not orally inform Mr. Calvert of his right  
23 to appeal his exceptional sentence. (Ex. 13, p. 4) On Dec. 11, 2003,  
24 Mr. Calvert filed a motion for an untimely direct appeal, as  
25 suggested by the commissioner. The Court of Appeals denied the  
26 motion. Mr. Calvert appealed to the Washington Supreme Court, which

1 denied the motion on Nov. 30, 2004. The pursuit of his untimely  
2 appeal took 354 days, from Dec. 11, 2003, to Nov. 30, 2004. (Near  
3 the end of his untimely appeal, Mr. Calvert also pursued a second  
4 personal restraint petition, which the Washington Supreme Court  
5 denied.) On March 11, 2005, Mr. Calvert filed a federal petition for  
6 writ of habeas corpus.

#### 7 **RULING**

8 The petitioner claims the statute of limitations was tolled  
9 while he pursued his untimely appeal. If the statute of limitations  
10 was not tolled through the untimely appeal, Mr. Calvert exceeded the  
11 statute of limitations. 28 U.S.C. § 2244(d)(1); § 2244(d)(2).  
12 Including the 354 days Mr. Calvert pursued an untimely appeal, 674  
13 days passed between the day Mr. Calvert's direct appeal period  
14 expired, on June 27, 2002, and the day he filed his federal habeas  
15 corpus petition, on March 11, 2005. If, on the other hand, the  
16 statute of limitations was tolled through his untimely appeal, Mr.  
17 Calvert would have used up only 320 days of his 365-day statute of  
18 limitations period for filing.

19 State prisoners have one year to file federal habeas corpus  
20 petitions, beginning from the time their direct appeal period expires  
21 in state court. 28 U.S.C. § 2244(d)(1)(A). The statute of  
22 limitations is tolled while a properly filed application for state  
23 collateral relief is pending. 28 U.S.C. § 2244(d)(2).

24 The statute of limitations, for Mr. Calvert, began to run on  
25 June 27, 2002, when his direct appeal period expired. Neither party  
26 debates that the statute of limitations was tolled on Jan. 15, 2003,

1 when Mr. Calvert sought timely collateral review in the state courts.  
2 The question is when the statute of limitations stopped being tolled.  
3 Mr. Calvert contends the statute of limitations was tolled until Nov.  
4 30, 2004, when his motion for an untimely appeal was finally denied.  
5 The respondent contends the statute of limitations never was tolled  
6 for the period between Dec. 11, 2003 and Nov. 30, 2004, while Mr.  
7 Calvert pursued an untimely appeal.

8       Whether a motion for an untimely state appeal causes the federal  
9 statute of limitations to be tolled is unclear. A U.S. Supreme Court  
10 ruling and Second Circuit dicta suggest that such a motion does not  
11 cause the statute of limitations to be tolled. Collateral state  
12 appeals must be "properly filed" to cause the statute of limitations  
13 to be tolled for federal habeas corpus petitions. § 2244(d)(2). In  
14 general, a state post-conviction petition rejected by state courts as  
15 untimely is not "properly filed." *Pace v. DiGuglielmo*, 125 S.Ct.  
16 1807, 1810, 161 L.Ed.2d 669 (2005). According to dicta from the  
17 Second Circuit, a "motion to extend the time for appeal" does not  
18 appear to be a "properly filed" application for state collateral  
19 review. *Bethea v. Girdich*, 293 F.3d 577, 579 (2nd Cir.2002). The  
20 motion referred to by the Second Circuit is similar to Mr. Calvert's  
21 motion for an untimely appeal. The policy against allowing a tolled  
22 statute of limitations for such motions is that state prisoners could  
23 abuse the statute of limitations otherwise. *Pace*, 125 S.Ct. at 1812  
24 ("On petitioner's theory, a state prisoner could toll the statute of  
25 limitations at will simply by filing untimely state post-conviction  
26 petitions.")

1 Mr. Calvert says he only filed his motion for an untimely direct  
2 appeal because a commissioner from the Washington Supreme Court  
3 suggested he do so. In a Dec. 4, 2003 ruling on Mr. Calvert's  
4 personal restraint petition, the commissioner wrote that Mr. Calvert  
5 "may seek to file an untimely notice of appeal by separate motion in  
6 the Court of Appeals, and if the State is unable to prove that he  
7 knowingly and voluntarily waived his right to appeal, that court may  
8 yet allow him to pursue an appeal." (Ex. 13, p. 4)

9 Mr. Calvert argues that he "should not be punished" for taking  
10 the commissioner's "bad" advice about filing a motion for an untimely  
11 direct appeal. (Petitioner's Traverse to Respondent's Answer and  
12 Memorandum of Authorities, p.7). Mr. Calvert argues, without  
13 specifically saying so, that he deserves equitable tolling through  
14 the period that he pursued his motion for an untimely direct appeal.

15 To prove equitable tolling, a prisoner must show that 1) he  
16 pursued his rights diligently and that 2) some extraordinary  
17 circumstance stood in his way to prevent him from filing his federal  
18 habeas corpus petition on time. *Pace*, 125 S.Ct. at 1814. Equitable  
19 tolling is rare. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir.1999).  
20 A prisoner must show that an extraordinary circumstance stood in the  
21 prisoner's way that made his federal petition "impossible" to file on  
22 time. *Id.*, citing *Calderon v. United States District Court (Kelly)*,  
23 163 F.3d 530, 541 (9th Cir.1998). See also *Alvarez-Machain v. United*  
24 *States*, 107 F.3d 696, 701 (9th Cir.1996). The policy behind this  
25 "high hurdle" is Congress' desire to accelerate the federal habeas  
26 process. *Calderon v. United States District Court (Beeler)* 128 F.3d

1 1283, 1288-89 (9th Cir.1997). In one case, the Ninth Circuit denied  
2 equitable tolling for a prisoner who missed the statute of  
3 limitations deadline while he pursued two rounds of state collateral  
4 review. *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir.2003). The  
5 court said prisoners "must be careful to timely file in federal  
6 court" after they conclude their first full rounds of state  
7 collateral review, lest they "run afoul of the statute of  
8 limitations." *Id.* To avoid that circumstance, the court said, a  
9 petitioner could timely file a federal habeas corpus petition after  
10 his first round of state collateral review is completed, then request  
11 that the district court exercise its discretion to stay the petition  
12 until the petitioner fully exhausted his second round of state  
13 collateral review. *Id.*

14 Mr. Calvert pursued his rights diligently by filing all of his  
15 appeals on time, with the exception of his initial direct appeal.  
16 Arguably, his failure to file an initial direct appeal resulted from  
17 the trial court's failure to inform him of his right to appeal his  
18 exceptional sentence. However, the Court of Appeals and Washington  
19 Supreme Court already considered this argument. They ruled that Mr.  
20 Calvert did not show that the trial court's error entitled him to  
21 relief. Specifically, a Washington Supreme Court commissioner ruled  
22 that the Court of Appeals did not err in determining that Mr. Calvert  
23 knowingly and voluntarily waived his right to appeal, partly because  
24 Mr. Calvert signed a plea statement that mentioned his right to  
25 appeal. His plea statement said:

26 I understand that the judge does not have to follow  
anyone's recommendation as to sentence. The judge must impose a

1 sentence within the standard range of actual confinement and  
2 community custody unless the judge finds substantial and  
3 compelling reasons not to do so. *If the judge goes outside the*  
4 *standard range of actual confinement or community custody,*  
5 *either the State or I can appeal that sentence. If the sentence*  
6 *is within the standard range, no one can appeal the sentence."*

7 Statement of Defendant on Plea of Guilty, (Ex. 2, p. 3) (*italics*  
8 *added*).

9 Equitable tolling may be appropriate if a judge affirmatively  
10 misleads a petitioner, Justice O'Connor wrote in a concurring  
11 opinion. *Pliler v. Ford*, 542 U.S. 225, 124 S.Ct. 2441, 2448, 159  
12 L.Ed.2d 338 (2004) (O'Connor, S., concurring). Here, the Washington  
13 Supreme Court commissioner did not affirmatively mislead Mr. Calvert.  
14 The commissioner suggested that he pursue a motion for an untimely  
15 appeal. Mr. Calvert does not allege, and the record does not  
16 suggest, that the commissioner said, for example, that the statute of  
17 limitations would be tolled for any federal habeas petition that Mr.  
18 Calvert might file in the future. The burden was on Mr. Calvert to  
19 consider what needed to be done at the federal level while he pursued  
20 his untimely state appeal.

21 Mr. Calvert's situation as a *pro se* petitioner makes equitable  
22 tolling a close call in this case. As *Biggs* suggests, Mr. Calvert  
23 could have pursued a stay of his federal habeas corpus petition while  
24 pursuing his motion for an untimely appeal in state court. *Biggs*, 339  
25 F.3d at 1048. But this Court recognizes that *pro se* petitioners  
26 might have trouble finding out about stays. The statute of  
limitations says nothing explicitly about stays. Courts do not  
encourage judges to advise *pro se* petitioners about stays. *Pliler*,  
124 S.Ct. at 2446. (Such advice from a judge would undermine judges'  
roles as impartial decision makers, burden judges with the task of

1 figuring out when the statute of limitations runs out for each  
2 petitioner, and risk misleading the *pro se* petitioners about the  
3 requirements.) Moreover, the statute of limitations urges  
4 petitioners to exhaust their remedies in state court. § 2254(b)(1)(A)  
5 ("An application ... shall not be granted ... unless ... the  
6 applicant has exhausted the remedies available in the courts of the  
7 State ..."). That language might lead a *pro se* petitioner to believe  
8 stays are not an option.

9 Ultimately, Mr. Calvert failed to show that it was "impossible"  
10 to file his federal habeas corpus petition on time. *Miles*, 187 F.3d  
11 at 1107. Regardless of the complexity involved in filing a federal  
12 habeas corpus petition on time, the statute of limitations says  
13 expressly that petitioners have a year to file their federal habeas  
14 corpus petitions after their direct appeal period expires. §  
15 2244(d)(1)(A). That should have alerted Mr. Calvert that he should  
16 research the filing deadline further. It is true that *pro se* habeas  
17 petitioners may not be held to the same technical standards as  
18 litigants represented by counsel, *Corjasso v. Ayers*, 278 F.3d 874,  
19 878 (9th Cir.2002) (tolling justified where a *pro se* petitioner's  
20 petition was rejected by district court clerk merely because he used  
21 the wrong cover sheet). But *pro se* petitioners are expected to  
22 understand the statute of limitations. *Biggs*, 339 F.3d at 1048.

23 Given the preceding considerations, the Court concludes that  
24 tolling of the statute of limitations is unwarranted. Accordingly,  
25 the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a  
26 Person in State Custody is denied.



1           **IT IS HEREBY ORDERED:**

2           1.     The petitioner's Petition under 28 U.S.C. § 2254 for Writ  
3                 of Habeas Corpus By a Person in State Custody, Ct. Rec. 6,  
4                 is **DENIED**.

5           2.     Any other pending motions in this matter are **DENIED AS**  
6                 **MOOT**.

7           **IT IS SO ORDERED.** The District Court Executive is hereby  
8     directed to enter this order, furnish copies to the petitioner and  
9     counsel for the respondent, and close the file.

10          **DATED** this   11th   day of October, 2005.

11    s/ Fred Van Sickle           
12                                 Fred Van Sickle  
13                                 Chief United States District Judge